



Respondent requests review of whether the claimant suffered a shoulder injury and whether claimant suffered an intervening accident requiring cervical surgery and payment of medical bills including future medical.

Claimant requests review of the nature and extent of claimant's left shoulder impairment as well as future medical benefits for the left shoulder.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

Briefly stated, claimant was removing sheetrock from a ceiling on November 10, 2010, when his left shoulder locked up and he had instant pain in his shoulder, back of his arm and also numbness into his pinky finger.

Respondent referred claimant to Dr. Greg Bono at KU. The doctor diagnosed claimant with a shoulder sprain/strain. Dr. Bono prescribed some medication, a sling and physical therapy as well as an MRI and some work restrictions. The December 9, 2010 MRI revealed mild acromioclavicular joint arthrosis and a small moderate grade partial thickness articular surface tear of the anterior aspect of the supraspinatus or a partial thickness tear of the rotator cuff. Claimant continued to work within his work restrictions. After six weeks in the sling and no improvement, Dr. Bono referred claimant to Dr. Mark Rasmussen, an orthopedic specialist.

Dr. Rasmussen treated claimant's left shoulder with physical therapy and also injections. He continued claimant's work restrictions. The doctor then ordered a cervical MRI. On January 5, 2011, claimant was diagnosed with a cervical disk disorder, bursitis rotator cuff, adhesive capsulitis and arthritis in the acromioclavicular joint. Dr. Rasmussen then referred claimant to a Dr. Adrian Jackson.

Dr. Jackson continued claimant's work restrictions and also ordered two cervical epidural injections. Claimant testified that he got some relief after the epidural injections. He was released from Dr. Jackson's care and claimant returned to work doing his normal work duties. Claimant began having problems again so he returned to see Dr. Jackson who ordered another cervical MRI. On July 19, 2011, Dr. Jackson performed a cervical fusion at C5-7 levels. On October 10, 2011, Dr. Jackson released claimant from his care.

Initially, respondent argues claimant was released from care by Dr. Jackson and then suffered a new cervical injury for which claimant failed to file a claim. Consequently, respondent argues claimant is not entitled to compensation for the cervical claim.

The ALJ analyzed this argument in the following fashion:

The respondent argued the cervical fusion was due to an intervening accident which was not pled in this case. The argument was based on the fact the claimant's left arm/shoulder symptoms, which had decreased somewhat from initial treatment, increased when he went back to performing his full duties and led Dr. Jackson to recommend the fusion. The claimant did not testify to any new injury in this time frame and the medical testimony did not show any change in diagnosis. Dr. Prostic said the claimant had underlying degenerative disk problems that were aggravated by the November 10, 2010 work accident.

An aggravation of a pre-existing condition was considered compensable under the version of the act in effect for injuries prior to May 15, 2011, see *Woodward v. Beech Aircraft Corp.*, 24 Kan.App.2d 510, 949 P.2d 1149 (1997). The record in this case proved an injury or aggravation to the cervical spine from the November 10, 2010 accident, but failed to prove an injury or aggravation attributable to any other accidents or series of accidents. The claimant's increase in symptoms after returning to full duty did not appear to be a material change in the injury already identified.<sup>1</sup>

The Board agrees and affirms.

Respondent next argues claimant failed to meet his burden of proof to establish that he suffered an injury to his shoulder. The ALJ analyzed that argument in the following fashion:

The respondent also argued there was no shoulder injury resulting from the accident. As mentioned, this was initially considered to be a shoulder injury and later was determined to involve the cervical spine. Dr. Prostic said the claimant had a traumatic rotator cuff tear that was caused or worsened by the work accident, and Dr. Gilbert confirmed the claimant had a partial rotator cuff tear, although Gilbert made a non-committal [sic] statement about whether the claimant's shoulder condition worsened because of the accident, comparing the injury to gray hair. The preponderance of the evidence proved the work accident caused injuries to both the left shoulder and the cervical spine.<sup>2</sup>

The Board agrees and affirms.

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<sup>1</sup> ALJ's Award at 3.

<sup>2</sup> *Id.*

Claimant argues the left shoulder impairment should be increased to the 15% rating provided by Dr. Prostic and that future medical should include the shoulder. Based upon the AMA *Guides*<sup>3</sup>, Dr. Prostic rated claimant's cervical spine at 20% to the body as a whole which placed him in the DRE Cervicothoracic Category IV due to his multi-level radiculopathy. He also rated claimant's left upper extremity at 15% of which 4% is loss of motion and the remainder is for weakness. The left shoulder rating converts to a 9% whole body impairment. Using the combined value charts, the 20% plus 9% results in a 27% whole body impairment. Based on the AMA *Guides*, Dr. Gilbert rated claimant's left upper extremity at an 8% based on the range of motion model. But Dr. Gilbert did not base his rating on loss of grip strength which the doctor agreed would be appropriate for claimant's injury. In this instance, the Board finds Dr. Prostic's rating for the left shoulder more appropriate and modifies the ALJ's Award to find claimant is entitled to compensation for a 27% whole person functional impairment.

Finally, the Board would note the ALJ based his comments regarding future medical treatment upon K.S.A. 44-510h as amended May 15, 2011. K.S.A. 44-510h, as amended effective May 15, 2011, is not applicable to this claim because that provision was not in effect when claimant sustained his accidental injuries on November 10, 2010, and it may not be retroactively applied to this claim. The amended version of K.S.A. 44-510h affects the substantive rights of the parties and respondent does not argue otherwise. Clearly, the amended statute is not intended to make a mere procedural change. There is nothing in the language of the New Act which suggests that the legislature intended K.S.A. 2011 Supp. 44-510h(e) to apply retroactively. On the contrary, as noted by our Supreme Court in *Bryant*<sup>4</sup>, only one provision of the New Act is specifically given retroactive application, K.S.A. 44-529(c). Had the legislature intended that K.S.A. 2011 Supp. 44-510h(e) should apply to claims involving accidents before May 15, 2011, it easily could have included language to accomplish that end. Consequently, claimant is entitled to future medical upon proper application to the Director.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>5</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

<sup>4</sup> *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

<sup>5</sup> K.S.A. 2010 Supp. 44-555c(k).

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated May 2, 2012, is modified to reflect claimant is entitled to compensation for a 27% whole person functional impairment, future medical upon proper application to the Director and affirmed in all other respects.

The claimant is entitled to 6 weeks of temporary total disability compensation at the rate of \$408.69 per week or \$2,452.14 followed by 112.05 weeks of permanent partial disability compensation at the rate of \$408.69 per week or \$45,793.71 for a 27% functional disability, making a total award of \$48,245.85.

As of September 13, 2012, there would be due and owing to the claimant 6 weeks of temporary total disability compensation at the rate of \$408.69 per week in the sum of \$2,452.14 plus 90.14 weeks of permanent partial disability compensation at the rate of \$408.69 per week in the sum of \$36,839.32 for a total due and owing of \$39,291.46, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$8,954.39 shall be paid at the rate of \$408.69 per week for 21.91 weeks or until further order of the Director.

**IT IS SO ORDERED.**

Dated this 14th day of September, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

e: Kevin J. Kruse, Attorney for Claimant, kkruse@bkwwflaw.com  
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier  
bbenedict@kdheks.gov  
Kenneth J. Hursh, Administrative Law Judge